UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

September 27, 2021

10:26 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re EIGHTH INTERIM FEE APPLICATION OF PRIME CLERK LLC, AS ADMINISTRATIVE AGENT TO THE DEBTORS, FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES FOR THE PERIOD FROM MARCH 1, 2021 THROUGH JUNE 30, 2021 filed by Prime Clerk LLC. (ECF #9736)

HEARING re Fifth Interim Fee Application of Herrick, Feinstein LLP as Special Conflicts Counsel to the Official Committee Of Unsecured Creditors for Allowance of Compensation for Services Rendered and Reimbursement of Expenses for the Period: 3/1/2021 to 6/30/2021, fee: $95,0I4.00, expenses: $551.16. filed by Herrick, Feinstein LLP. (ECF #9741).

HEARING re Seventh Joint Application of Paul E. Harner, as Fee Examiner and Ballard Spahr LLP, as Counsel to the Fee Examiner, for Interim Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from: 3/1/2021 to 6/30/2021, fee:$347092.50, expenses: $70.00 (ECF #9777)

HEARING re Eighth Application of Weil, Gotshal & Manges LLP, as Attorneys for the Debtors, for Interim Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from: 3/1/2021 to 6/30/2021, fee:$2,553,7IL00, expenses: $218,228.99. filed by Weil, Gotshal & Manges LLP. (ECF #9745)

HEARING re Objection BY ORIENT CRAFT LIMITED (ECF #9810)

HEARING re Response / Reply of Weil, Gotshal & Manges LLP in Support of Interim Fee Application (related document(s)9745, 9810) filed by Garrett A. Fail on behalf of Weil, Gotshal & Manges LLP. (ECF #9838)

HEARING re Eighth Interim Fee Application of Akin Gump Strauss Hauer & Feld LLP as Counsel to the Official Committee of Unsecured Creditors for Allowance of Compensation for Services Rendered and Reimbursement of Expenses for the Period: 3/1/2021 to 6/30/2021, fee: $l,275,454.50, expenses: $1,215,770.92. filed by Akin Gump Strauss Hauer & Feld LLP. (ECF #9742)

HEARING re Objection BY ORIENT CRAFT LIMITED (ECF #9810)

HEARING re Response /Reply of Akin Gump Strauss Hauer & Feld LLP and FTI Consulting, Inc. to Objection by Orient Craft Limited to Interim Applications for Compensation (related document(s) 9743, 9810, 9742) filed by Philip Dublin on behalf of Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. (ECF #9837)

HEARING re Eighth Interim Application of FTI Consulting, Inc., Financial Advisor to the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. for Interim Allowance of Compensation and Reimbursement of Expenses for the Period : 3/1/2021 to 6/30/2021, fee: $135,263.00, expenses: $0.00. filed by FTI Consulting, Inc. (ECF #9743)

HEARING re Objection BY ORIENT CRAFT LIMITED (ECF #9810).

HEARING re Response /Reply of Akin Gump Strauss Hauer & Feld LLP and FTI Consulting, Inc. to Objection by Orient Craft Limited to Interim Applications for Compensation (related document(s)9743, 9810, 9742) filed by Philip Dublin on behalf of Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. (ECF #9837)

HEARING re Motion to Compel /Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief filed by Luke A Barefoot on behalf of Transform SR Brands LLC (LCF #9647)

HEARING re Declaration of Kimberly Black in Support of Defendant's Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s)9647) filed by Luke A Barefoot on behalf of Transform SR Brands LLC. (LCF #9648).

HEARING re Response to Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s)9647).

HEARING re Response / Debtors' Reservation of Rights and Statement Regarding Diana Arney’s Response to Motion to Enforce Sale Order (related document(s)9647, 9807) filed by Jacqueline Marcus on behalf of Sears Holdings Corporation. (LCF #9819)

HEARING re Declaration of Kimberly Black in Support of Defendant's Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s)9647) filed by Luke A Barefoot on behalf of Transform SR Brands LLC. (LCF #9648)

HEARING re Reply to Motion / Transform SR Brands LLC's Reply in Further Support of its Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s) 9807) (related document(s)9647) filed by Luke A. Barefoot on behalf of Transform SR Brands LLC. (ECF #9828)

HEARING re Declaration of Kimberly Black in Support of Transform SR Brands LLC’s Reply in Further Support of its Motion to Enforce Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing Sale of Certain of the Debtors’ Assets Free and Clear Liens, Claims, Interests, and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief (related document(s) 9807, 9828) (related document(s) 9647) filed by Luke A. Barefoot on behalf of Transform SR Brands LLC (RVG $9829).

HEARING re Notice of Agenda Matters Scheduled for Hearing to be Conducted through Zoom on September 27, 2021 at 10:00 a.m.

HEARING re Amended Notice of Agenda / Notice of Agenda Matters Scheduled for Hearing to be Conducted through Zoom on September 27, 2021 at 10:00 a.m.

HEARING re Amended Notice of Agenda / Notice of Second Amended Agenda of Matters Scheduled for Hearing to be Conducted through Zoom on September 27, 2021 at 10:00 a.m.

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for Debtors and Debtors in Possession
767 Fifth Avenue
New York, NY 10153

BY: GARRETT FAIL (TELEPHONICALLY)

WILMER CUTLER PICKERING HALE & DORR
Attorneys for Lampert, et al.
7 World Trade Center
New York, NY 10007

BY: PHILLIP D. ANKER (TELEPHONICALLY)

CLEARY GOTTLIEB STEEN HAMILTON LLP
Attorneys for Transform Holdco LLC
One Liberty Plaza
New York, NY 10006

BY: LUKE A. BAREFOOT (TELEPHONICALLY)

AKIN GUMP

Attorneys for Unsecured Creditors Committee

1 Bryant Park

New York, NY 10036

BY: SARA BRAUNER (TELEPHONICALLY)

DEAN CHAPMAN (TELEPHONICALLY)

PHILLIP DUBLIN (TELEPHONICALLY)

HERRICK FEINSTEIN LLP

Attorneys for Official Committee of Unsecured Creditors

2 Park Avenue

New York, NY 10016

BY: CHRISTOPHER CARTY (TELEPHONICALLY)

SHEPPARD MULLIN

Attorneys for Fee Examiner

30 Rockefeller Plaza

New York, NY 10112

BY: PAUL HARNER (TELEPHONICALLY)

BALLARD SPAHR LLP
Attorneys for Fee Examiner
1735 Market Street
Philadelphia, PA 19103

BY: VINCENT MARRIOTT (TELEPHONICALLY)
CHANTELLE MCCLAMB (TELEPHONICALLY)

QUINN EMANUEL
Attorneys for Administrative Claims Representative
1300 I Street, NW
Washington, DC 20005

BY: ERIKA MORABITO (TELEPHONICALLY)
BRITTANY NELSON (TELEPHONICALLY)

TANNEN LAW GROUP, P.C.
Attorneys for Diana Arney
77 W. Washington Street
Chicago, IL 60602

BY: MICHAEL MURPHY TANNEN (TELEPHONICALLY)

UNITED STATES DEPARTMENT OF JUSTICE

Attorneys for The United States Trustee

201 Varick Street

New York, NY 10015

BY: PAUL KENAM SCHWARTZBERG (TELEPHONICALLY)

P R O C E E D I N G S

THE COURT: Administrative priority in secured claims, and ultimately with consummating the Chapter 11 Plan. In the past, the Debtors have gone through this report before we began the hearing and I don't know if they want to do that this morning. It probably makes sense to do so.

MR. FAIL: Good morning, Your Honor, Garrett Fail, Weil, Gotshal for the Debtors. Are you able to hear me?

THE COURT: Yes.

MR. FAIL: Thanks. I'm -- just to confirm, we're doing this by the Zoom audio today, right? No dial-in necessary for me?

THE COURT: Correct.

MR. FAIL: All right. Excellent. So, Your Honor's corrected, we did file a Second Amended Agenda. It's at 9848. I hate to correct Your Honor. I don't believe we filed another status report. I think the last one that I presented to you was at a --

THE COURT: Well, I'm sorry, yes. This was filed -- I -- correct me if I'm wrong, but I saw the 27 and assumed it was today, but it's July 27th.

MR. FAIL: Exactly, Your Honor.

THE COURT: Okay.

MR. FAIL: I pointed that out to your Chambers

simply to show the last update, and I had walked the Court through it.

THE COURT: Okay.

MR. FAIL: Following that -- following that update, we did commence and execute the Third Interim Distribution, sending $10.5 million out to opt-ins and allowed not opt-out creditors.

THE COURT: So, when will the --

MR. FAIL: So --

THE COURT: -- next update be, in October?

MR. FAIL: That -- either October or November, Judge. I just have to go back to see if we were doing it quarterly. I thought we were doing it quarterly, and so 789 -- oh, I think it's November, Your Honor. Although, that's not quarterly, so I guess, it could be October, Your Honor.

THE COURT: Right. I think it would be October.

MR. FAIL: It'll be October.

THE COURT: All right. Okay. Very well. So, I think we should just then go down the agenda.

MR. FAIL: Great, Your Honor. There's six interim fee applications on and listed. They're -- the first three that are listed are uncontested. It's the Application for Prime Clerk LLC, the Application of Herrick, Feinstein LLP, and the Application of Mr. Harner as the Fee Examiner -- and the -- and Ballard Spahr to the Fee Examiner.

THE COURT: Right.

MR. FAIL: The following three are for Weil, Gotshal& Manges LLP, Akin Gump Strauss Hauer & Feld LLP, and FTI Consulting, Inc.

There was one objection filed to the last three by Orient Craft, Weil Gotshal, filed reply. Akin Gump and FTI filed a reply as well.

I'd like to be efficient so, Your Honor, I'm sure that you've read each of the applications and the reply. I'm happy to answer any questions, but would otherwise request --

THE COURT: Well, why don't we deal with the first three first. Again, that's Prime Clerk, Herrick, Feinstein, and Mr. Harner, and the Ballard Spahr firm, which are unopposed.

I also reviewed Mr. Harner's statement in respect of the interim fee applications and his report on his progress with regard to the Second through Seventh Applications.

Does anyone have anything to say on any of those three applications? Again, Herrick, Feinstein, Prime Clerk, and Mr. Harner and Ballard Spahr?

MR. MARRIOTT: Your Honor, if I might? Can you hear me?

THE COURT: Yes.

MR. MARRIOTT: Hi. Vince Marriott, Ballard Spahr on behalf of Mr. Harner as the Fee Examiner. With me is my colleague, Chantelle McClamb.

Your Honor, Mr. Harner came down with a breakthrough COVID infection in the last few days and is flat on his back, and as a consequence, is unable to participate in today's hearing. I did -- he did want me to send his apologies. And I'll do my best to address any questions that would have otherwise been directed to Mr. Harner.

THE COURT: Okay. Well, I hope he feels better soon. And no apology is necessary.

The only questions I have really relate to the other applications that are on for today. I don't -- I don't have any questions about these three.

And hearing no one else, I will grant each of them on an interim basis.

So, Mr. Fail, is there going to be one proposed order?

MR. FAIL: Yes, Your Honor.

THE COURT: Okay. So, these three will be included in that one order.

And then as far as the other three are concerned, I have, in fact, read the objection by Orient Craft, which was joined in by another administrative expense creditor,

and I've also read the two replies, as well as again, the filing on behalf of Mr. Harner by Ballard Spahr, which details the Fee Examiner's work with -- I'm assuming, one or more, maybe all of these applicants as well as others -- for the prior interim applications and the -- and these. That work is ongoing, although I gather that it's fairly far along with preliminary proposals, or the first preliminary reports having been made by the Fee Examiner.

But I -- Mr. Marriott, I understand that the Examiner doesn't object to any of these applications but wants to make sure that the same language that was in the prior orders is in any order granting these applications on an interim basis, that carves out and recognizes the rights of the Fee Examiner to object on a final basis and to seek disgorgement.

MR. MARRIOTT: Yes. Vince Marriott, Your Honor, on behalf of the Fee Examiner. That's correct. We are in ongoing discussions with all of the applicants and the reservation of rights is designed to preserve whatever outcome those ongoing discussions result in. And we're comfortable proceeding with approval of the applications, subject to the reservation of rights.

THE COURT: Okay. So, these three firms Weil, Akin Gump, and FTI, are all large firms. There are times in cases where there's not much work left to be done, and it

may not be a large firm, that I require holdbacks. Does the examiner have any concern that, based on his work, the amounts that he is discussing with the firms would be so great that I should have a hold-back here, as opposed to --

MR. MARRIOTT: Well, Your Honor, Vince Marriott --

THE COURT: -- looking to disgorgement?

MR. MARRIOTT: I'm sorry, Your Honor. Vince Marriott on behalf of the Examiner. Given the size of the firms and the amounts that are under discussion, we are not concerned that there is a need for further hold-back.

THE COURT: Okay. And I guess these three firms -- well, maybe not FTI, are doing substantial work on a going forward basis too, I gather. And there's always a basis to -- since money is fungible -- deal with those applications.

MR. MARRIOTT: Yes, that's -- that -- Vince Marriott, Your Honor. Yes, that is also true in this instance.

THE COURT: Okay. All right. So, again, I -- I've read these pleadings, but I'm happy to hear from you, Mr. Wander, on the objection.

MR. WANDER: Good morning. David Wander, now with Tarter Krinsky & Drogin, on behalf of Orient Craft Limited. Your Honor, I'm aware that this is an interim fee application and that it's subject to final review.

Prior to this hearing, I want Your Honor to know

that I did speak with the Fee Examiner, and the one comment I'd like to make -- excuse me while I try and fix the video here.

THE COURT: That's fine.

MR. WANDER: The one comment that I'd like to make, in speaking with the Fee Examiner, I believe he explained that the scope of his review is somewhat limited, and one thing that he does not take into account is an overview of the benefit of the services that were rendered.

So, I just want to make that point. Now, if the interim compensation that's been awarded is subject to 330(a)(5), which I believe one of the applicants, I think it was Akin pointed out, I'm fine with that. I'm fine with the Court reviewing all of the fee applications when there's a final hearing and taking into account everything that has gone on with -- in this case.

One thing that the parties seem to agree on is that -- and I'm referring to paragraph 3 of the Akin Gump reply, that "professionals are subject to the right of any party in interest to challenge fees it views as unreasonable".

What I've tried to, Your Honor, is give the point the view of an allowed administrative creditor who has not received any money and who's concerned about being paid because the prospects of the Plan going effective appear

very slim.

Now, Section 330 and 331 use the word "may," the Court "may" award interim compensation, so -- indicating that it's not automatic. And we simply submit that given the fees that have paid to date and the status of the current case, it might be appropriate to defer any award of internal compensation at this point given the relative small amount of funds compared to the approximate $250 million in fees that have been paid to the professionals. We're not talking about a large sum of money. It's, to a certain extent, it's symbolic of where we are today.

And while Weil, Gotshal pointed out that we are not objecting to any particular time entries that they have, because that's more of the Fee Examiner's role, there were certain time entries by Akin and FTI that we were specifically objecting to. And that is, them seeking to be paid, to find the litigation funder, which from our point of view is being paid to find someone to pay their fees.

So, that being said, Your Honor, again, recognizing this is an interim application, I wanted to have my client's objections on the record, so when it's time for a final hearing, Your Honor didn't say something, like, Mr. Wander, where were you all along when there were interim applications for compensation. My objection in length, is very limited, my views are well known, and I simply wanted

to put before Your Honor the views of an allowed administrative creditor at this juncture in the case.

THE COURT: Okay. All right. Thank you. Again, I've read the replies. I don't know if the -- any of those firms wants to say anything in response to Mr. Wander's remarks just now.

MR. FAIL: Your Honor, it's Garrett Fail from Weil, Gotshal. I think we've said everything that we need to in the reply. I don't think it need any more airtime.

I'm happy to answer any other questions. We disagree with the objection; we think it should be overruled.

THE COURT: Okay.

MS. BRAUNER: Good morning, Your Honor. Sara Brauner, Akin Gump on behalf of the Committee. I will also rest on our papers. We also disagree with numerous comments made by Mr. Wander and his characterizations. But unless the Court has any question, we'll rest on our papers.

THE COURT: Okay. All right. All right. I think like everyone in this case is concerned that the Plan has not yet gone effective. On the other hand, I think I need to shoulder some amount of the responsibility for that in that the ESL litigation -- the large ESL litigation, that is the avoidance litigation -- has not moved as quickly as I would have liked it to. And again, that's in large measure

because I'm still working on the mammoth motions to dismiss.

Clearly, while the recoveries, in large measure, have exceeded the estimates that I heard at Confirmation, the fees have also been substantially greater. However, based on my review of the prior interim applications and these interim applications, those fees are understandable, and I believe, at least on an interim basis, reasonable. And that includes the time spent by FTI, and to some extent by Akin Gump, in considering and dealing with the potential litigation funder.

Of course, I only see the time entries, but I think I can reasonably infer that that funding is not just to obtain compensation for the prosecution of the litigation, but is, in fact, to enable the litigation to proceed in way that benefits all the creditors. The litigation was always going to be a substantial source of recovery here for creditors.

Now, I think there's no doubt that final fee applications are subject to Section 330(a)(5), and in the perspective of the entire case, parties in interest can raise objections to final fees. And I will note that one of those objections could be, as recognized by Chief Judge Morris in, In re Headlee Management Corp., that "the professionals simply ran the Chapter 11 case into administrative insolvency" and didn't pull the plug sooner.

That last part is not the quote.

But I don't see that happening at this point at all. I mean, I think that the work is being done to finish their liquidation of the claims, administrative expense claims, priority claims, the secured claims that are on appeal, to finish liquidating the assets, and pursue the preference and fraudulent transfer claims. If I felt that professionals were spending $10 to make $5 or even $10 or $9, that would be a problem. But I don't sense that. I don't get that impression at this point.

So, I think that what I said at prior hearings on requests for payment of administrative expenses applies today as well, which is that the professionals are working to obtain recoveries for the creditors in the case, and it wouldn't be appropriate at this point to stop compensating them to do that.

I do have orders that to some extent provide for these types of payments. I think the parties ought to look at them carefully to see if they really do provide for a sort of replenishing carveout or not before any of these types of issues are raised in the future. I mean, obviously, if they do then we shouldn't even be talking about this. If they don't, then what I've just said for the past five or so minutes applies. And I'm not ruling on that issue today. I -- how and to what extent, those prior

orders, i.e., the Confirmation Order and the DIP/Cash Collateral Order do provide for a carveout or a replenishing fund.

So, I will grant these interim applications and do so for the reasons that I've just stated, and subject to the caveats that I've just stated -- or qualifications for final applications, which are -- very clearly, would not be limited solely to the types of things that I think the fee examiner is primarily focusing on, which is, you know, potentially overbilling, double entries, things like that, but rather, more a sense that given its circumstances of the case, have the professionals kept going when they should have stopped. And I clearly don't get that sense at this point.

MR. WANDER: So, Your Honor, can I get, or raise a point of import?

THE COURT: Sure.

MR. WANDER: Yes, I've been requesting that Weil and Akin at least disclose the amount of money in the professional carveout account. I don't think the amount should be a secret.

THE COURT: Well, that -- I mean, I think that these reports generally do that, but they come every quarter.

MR. WANDER: I don't believe it's in the quarterly

report, Your Honor.

THE COURT: Well, it shows what's been paid though.

MR. WANDER: Your Honor, I believe there's a -- there's a separate account that hasn't been disclosed, how much money is in it. I think there are tens of millions of dollars, and both -- if I'm -- if I'm wrong, I'll be corrected.

THE COURT: Well, okay. I mean, at least from -- I mean, I was reviewing the July one, although I thought -- I thought it was the September one, they do have entries for the costs, generally, you know, in the aggregate. And I'm assuming that's the type of reporting we're talking about.

I also have the impression since that's gone up and down, that -- and based on the replies too -- that there is some interaction between the DIP/Cash Collateral Order and the Confirmation Order, as far as funding of professional fees, which is also complicated by the fact that for a lot of the litigations, the counsel are on contingency fees.

But, Mr. Fail, is there -- is there a specific account that stays in a fixed --

MR. FAIL: Your Honor, this is -- this is a lot to do about nothing again. The professionals get paid what they invoice. They get monthly, on or about -- you know, we

don't chase, it does -- it's not on the dime. But we file a fee statement. We get paid 80 percent before fee at hearings, you approve quarterly, or thereabouts, the payment of the 20 percent. That's what the professionals get paid.

Mr. Wander did some calculations. He got it right or he got it wrong. But they -- anybody can add that up. The money that goes into the professional fee account goes in and comes out. He doesn't get access to accounting. We shouldn't spend any more time.

But, Your Honor, if you'll look at what we do in our status reports, you know, we're showing a whole or a deficiency to get to the effective date, you know, of a -- the last one was $80.5 million minus the litigation and plus some other things. But, I mean, there's no $80 million in excess some place sitting around and waiting. This is a lot to do about nothing.

THE COURT: Well, I guess --

MR. FAIL: Professionals get what they invoice and what you have paid. They only get paid what you approve, Judge.

THE COURT: Well, so what I -- what I -- I guess what I -- I'm coming back to what I said a few minutes ago, which is that there were references, I think primarily in the Akin Gump response, to carveouts and the mechanism for funding the litigation in the Confirmation Order.

MR. FAIL: Are you talking about the litigation trust fund?

THE COURT: Yes. Yeah. And I think that may be what Mr. Wander's referring to as opposed to something else.

MR. FAIL: I'll let -- I'll let Ms. Brauner respond if she wants to add anything further in that regard.

MS. BRAUNER: For the record again, Sara Brauner, Akin Gump, on behalf of the Committee. I think there's been some conflation. There certainly was in Mr. Wander's objection, of various sources of funding.

With respect to the Litigation Trust Account, as it's called in the Confirmation Order and the Plan, that was funded pursuant to Your Honor's order on Confirmation with an amount certain. The litigation work that Akin Gump and FTI and other professionals and experts and document vendors have been doing since Confirmation, has been paid out of that account.

And I will make just one point to the extent it is unclear --

THE COURT: And it's not been replenished. It's just --

MS. BRAUNER: That's right.

THE COURT: -- that was a fixed amount of money. Right. Okay.

MS. BRAUNER: That's right. And just --

MR. WANDER: Correct, Judge. Correct, Judge.

MS. BRAUNER: -- to be very clear, the funds that Akin Gump has been paid, contrary to contentions in the objection, were capped effectively on our own decision at $10 million. So, there is over $6 million that Akin Gump has incurred in respect to the litigation that we have not been paid on.

So, to the extent there's any insinuation that we are not motivated to maximize value, we cannot have skin in the game, it's simply not accurate. Those decisions have been made consensually and in consultation with the Debtors to ensure that money is where it needs to be to continue funding. And yes, as we've disclosed, we are in the process of looking for potential additional funding.

And to the extent Mr. Wander or any other claimant would like to discuss that process with us, they know where to find us, and we're happy to do so.

THE COURT: Okay. So, I think that, I mean, I think that might clarify what admittedly could be confusing to a creditor, which is that there was a special account set up to fund the litigation trust. But --

MR. FAIL: Correct.

THE COURT: -- I don't think there's any special general fee account, it's just part of the Debtors' sources and uses. You know, things come in and things come out.

And some things get paid with a Court order, namely fees and expenses, interim distributions to creditors, some things get paid in the ordinary course because they're ordinary course business expenses. But I don't believe there's a separate from the litigation account --

MR. FAIL: There has been, throughout the case, Judge, a carveout for professional fees.

THE COURT: Well, that's based though on the Cash Collateral/DIP order. That's a separate --

MR. FAIL: Correct, Your Honor.

THE COURT: Right.

MR. FAIL: I agree. Yes. I'm sorry. If you were suggesting that, you know, post-Confirmation, money was set aside on a go forward basis in advance, it is not true. Cash sits in the Debtors' account, the $25 million got funded to the -- to the litigation trust, and on a monthly basis, expenses get paid. And some of the fees get paid on an ongoing basis into a side account rather than to the professionals. But it's not, you know, advanced for months ahead.

So, to the extent that Your Honor decides the professionals should stop working, then funding will stop, and expenses will stop, and work will stop.

THE COURT: So, I think therefore what is worth sharing with anyone who's considering making an objection on

fees is what is left in respect of the carveout account, for want of a better term. Because obviously, a carveout is something that people shouldn't be fighting over except as far as the reasonableness of the fee, nothing else, nothing about, you know, some people getting paid ahead of others because the carveout is a carveout. That's worth discussing I think in advance of any objection.

MR. FAIL: It'll be disclosed before any final fee application hearing, Judge. It, you know, that's not -- it's a non-issue.

THE COURT: Okay. All right. Okay. So --

MR. MARRIOTT: Your Honor? Oh, I'm sorry, Your Honor.

THE COURT: -- again, I'll grant these applications as well, with the -- with the reservation of rights that we discussed at the beginning for the Fee Examiner in respect to disgorgement and obviously, subject to every party in interest's rights in respect to the file fee application, under Rule -- under Bankruptcy Code Section 330.

MR. MARRIOTT: Thank you, Your Honor. Vince Marriott, again Ballard Spahr. You went -- you did what I was about to ask, and that was confirm the form of order that you would be signing with the reservation of rights.

THE COURT: Right.

MR. MARRIOTT: If there's nothing further on the fee application, might I ask that Ms. McClamb and I be excused --

THE COURT: Yes.

MR. MARRIOTT: -- for the balance of the hearing?

THE COURT: Yeah, that's fine. Thanks.

MR. MARRIOTT: Thank you.

THE COURT: Okay. All right. I have one other request before we get on to the other matter on the agenda, which is the motion by Transform Hold Co., which is that when the Debtors are coming up to the October hearing, you file the status report, not on the eve of the hearing, but a few days in advance so that people can focus on it and I can focus on it to get a sense of where we're going. There will still clearly be a substantial open item, which is the avoidance litigation, primarily the fraudulent transfer avoidance litigation. And hopefully, you'll have more clarity on the appeals on the Transform litigation by then.

But I was informed at the last Omnibus hearing that there had been active discussions with the administrative expense group and the Debtors about potential ways to expedite emergence, recognizing that those litigations would continue and can continue under the trust structure. And I don't -- I don't know where those discussions are and I'm not asking for any report on them

today, but that's a topic that might well come up at the next Omnibus hearing.

MR. FAIL: Understood, Judge.

THE COURT: Okay. All right. So, the other matter on the calendar today is Transform Hold Co.'s motion to enforce the Asset Purchase Agreement Approval Order or the Sale Order. I've read that motion and the objection by Diana Arney, as well as the attachments or the exhibits to it, and the status report.

I will note, and I think this -- I may need an update on this, I may not -- that this motion relates to a litigation pending in state court in Illinois. But I have attached to the response, or the objection, an order by Judge O'Hara from July 26, which grants Transform SR Brands' motion for stay pending my determination of this motion before me, the motion to enforce. I'm assuming there's no other update for that, but could the parties let me know if that's true, if that assumption is accurate?

MR. BAREFOOT: Good morning, Your Honor. Luke Barefoot from Cleary Gottlieb for Transform Hold Co. and its affiliates. That's correct, Your Honor, the motion to stay discovery in the Illinois action pending the outcome of motion to just force -- to enforce was granted and that remains the status.

THE COURT: Okay.

MR. TANNEN: Your Honor, Michael Murphy. I'm preliminarily honored to appear before you. I've made it very clear to the Debtor and to (indiscernible) that we're not going to go down the discovery goat until you resolve the motion.

THE COURT: Okay.

MR. TANNEN: I made it very clear.

THE COURT: All right. Thank you, Mr. Tannen. All right.

And I -- I'm right, I think. I mean, I -- we checked this morning. There's not been a reply by Transform to the objection by the plaintiff in the Illinois action?

MR. BAREFOOT: Your Honor, there was a reply filed on the 22nd and it's at Docket item 9828.

THE COURT: Huh.

MR. BAREFOOT: It should be in Your Honor's hearing binder.

THE COURT: I think -- I actually didn't see -- I don't have it in this binder. The last thing I had in the binder is a declaration by Kimberly Black. I don't have a legal -- I don't have a reply setting forth Transform's legal arguments in response to the objection. My clerk is checking.

MR. BAREFOOT: It is at Docket 9828, Your Honor. I'm not sure what the problem with the binders is, but --

THE COURT: I -- I've just been handed it to me. It's just been handed to me.

MR. BAREFOOT: Would Your Honor like to take a short recess --

THE COURT: Yes, I would. Thank you.

MR. BAREFOOT: -- so you have a chance to review it?

THE COURT: I would like to. And I apologize. I'll be back in about 10 minutes.

MR. BAREFOOT: Very good, Your Honor.

THE COURT: Okay.

(Recess)

THE COURT: Okay. This is Judge Drain. I'm back on the bench in, In re Sears Holdings Corp., et al., and I apologize. I actually had two binders. I had one that I guess had been prepared by the Debtor and then a separate binder, which I guess came in from one of you two. And only the latter one had the reply to it, which I've not been through as well as the supporting documents for that reply.

MR. TANNEN: Your Honor? Your Honor?

THE COURT: Yes?

MR. TANNEN: This is Michael Tannen, and I, as I've said, got involved in this case very late in the game, and there was a very accelerated briefing schedule. I wanted to make sure that you've received the status reports

--

THE COURT: Yes, I did.

MR. TANNEN: -- Docket 9845.

THE COURT: I did.

MR. TANNEN: I apologize for getting it to you. However, I felt it duty-bound to get it to you. It's information that just came to us and that's why we sent it. And I'm glad you have it.

THE COURT: Right. I do. And it's relevant to obviously, the basis for the objection, which didn't address that basis when it was made. But I think it's still relevant in light of the case law.

Let me -- I'm happy to hear oral argument from both of you. But in large measure, I'm guided here I think by In re Motors Liquidation Company, 829 F.3d 135 (2d Cir. 2016), which I think is the last word from the Circuit on these types of issues which go both to the power of the Court to issue an order that would cover this type of claim, and also to the due process argument that has been made by Ms. Avery.

So, again, I'm happy to hear brief oral argument.

MR. BAREFOOT: Your Honor, Luke Barefoot from Cleary Gottlieb again. I'll be brief, guided by Your Honor's comments.

Your Honor, I just want to walk through briefly

the relevant provisions of the Sale Order that support the relief that we're seeking. And specifically, there's a number of provisions where the Court made factual findings that Transform was not a successor to the Debtors, that Transform would not have entered into (indiscernible) or consummated the transaction without the free and clear provisions of the order and a finding that the consideration paid by Transform reflected its reliant (indiscernible).

The Sale Order then goes on to say that Transform would have no liability for any claims against the Debtors, whether known or unknown, and separately ordered in paragraph 27, that there would be no (indiscernible) for the claims against the Debtors, including any successor liability claims (indiscernible).

Your Honor, I -- just a few brief additional points. The claim here plainly arose before the petition date. While there has been some suggestion by Ms. Arney in their -- her paper, that the claim didn't arise until the injury manifested itself. By definition, in pursuing a successor liability claim, of necessity, that claim had to exist in the first instance against the Debtors.

And given the breath of the Bankruptcy Code's definition of claim, it clearly existed based on her allegations when she purchased the dryer with what she claims was a latent defect in (indiscernible). Even though

the claim did not manifest itself or become liquidated until after the sale, that claim still existed as a contingent unknown claim in 2008, (indiscernible) the dry was (indiscernible).

In addition, Ms. Arney was an unknown creditor who was only entitled to publication. There was no information that gave the Debtors or Transform reason to believe that Ms. Arney had a claim, and the Court found that the -- in its Sale Order, paragraph (indiscernible)(p) and paragraph 4, that publication notice was good, sufficient, and appropriate.

THE COURT: Well, can I -- can I interrupt you on this point?

MR. BAREFOOT: Please.

THE COURT: The status report that was filed on the -- on the 24th asserts with references to other litigations that there was a known defect to this type of appliance, and therefore, at least asks that I draw an inference that Ms. Arney was entitled to actual notice as opposed to publication notice, as per the Motors Liquidation case. What is --

MR. BAREFOOT: Your Honor --

THE COURT: -- what is your response to that?

MR. BAREFOOT: Your Honor, the first of the -- there are two litigations that are cited in that status

report. And I want to just say at the outset, that while it's characterized as a status report, we believe that it's effectively an attempt sur-reply on grounds that certainly could have been raised in the original timely objection but were not. So, I would ask that to the extent the Court wants to rely on that, that we would have an opportunity to respond.

But briefly, there are two litigations that are cited in that -- in that status report. The first of them, the Roberts case, was the class action to which the Debtors were in no way named or a party. So, I don't see how a litigation against other defendants would necessarily put the Debtors on notice that any of the purchasers of any of their products would have been known creditors.

The second one of those actions is an individual case from 2015. And that one did involve the Debtors and was settled. But I think it's a very slim read to say that on the existence of a single product liability action that the Debtors were then obligated to send specific notice to the hundreds of thousands, or potentially millions, of customers that purchased dryers from Sears.

And I think this is quite distinguishable from, you know, the ignition switch litigation where the evidentiary record that was before the Court established that Debtors had extensive knowledge and detailed internal

documents that made them specifically aware of the ignition switch defect. And they also were required to maintain records under federal law of all of the purchasers of their vehicles.

A single product liability action, having been filed against the Debtors, it would be relatively unprecedented to say that based on that, the Debtors, who don't have the same requirements under -- that car manufacturers were subject to under federal law -- were somehow required to go out and provide very extensive individualized notice to anyone who conceivably purchased a similar product.

THE COURT: Okay.

MR. BAREFOOT: And, Your Honor, I'll just briefly end by discussing the distinction between Grumman and Old Carco. You know, the -- Ms. Arney relies extensively on Grumman and argues that it's directly on point.

We do not believe that it is. First off, in Grumman, there was no direct relationship between the debtors and the plaintiff, who was making a product liability (indiscernible). Because in that case, the plaintiff did not purchase the vehicle directly from the debtors. Instead, the debtors made a component part that went into the vehicle.

So, in that context, it certainly makes sense to

say that there would be a due process issue with publication notice where even if the plaintiff had read the publication notice not knowing where the component parts that went into the car came from or were acquired, they wouldn't have a reason to know that they had a claim or needed to take action to reserve their rights.

By contracts, both here and in the Old Carco case, there was a direct relationship. Ms. Arney alleges that the purchased the dryer directly from the Debtors, and therefore, she would have had a reason to believe that upon reading the publication notice, that she needed to take action to protect her rights.

And unless Your Honor has any questions, I'll cede the podium.

THE COURT: I may after I hear from Mr. Tannen, but not for now. Thanks.

MR. BAREFOOT: Thank you.

MR. TANNEN: Thank you, Your Honor, for allowing me to appear. (indiscernible) 9,647 documents filed in this case for the bankruptcy came into my life. I viewed all the applicable caselaw, and we believe that this boils down to just several elemental questions.

Did Ms. Arney have a right to payment when the bankruptcy was filed and the sale confirmed? I think the answer to that is no because she had not been injured yet,

and no injury had manifested itself, which is why I think Sears's reliance on asbestos cases are not helpful.

In re Carco was an extended warranty case with prior recall notices, and the Court premised its belief or its finding on notice grounds that it's reasonable to expect that someone who buys a car on a warranty contract is actually going to get service. The idea that the prepetition relationship is the touchstone for this I think is not consistent with the law as I've read it.

THE COURT: Well --

MR. TANNEN: Did Ms. Arney have a Section 105 claim --

THE COURT: What is your take on the Motors Liquidation cases determination that claimants who had economic damages claims, i.e. their car was worth less because of the post-bankruptcy sale publicity of the ignition switch defect, would have a claim that could be covered by -- or would be covered by the free and clear order, even though they didn't know of that defect until years after the sale order?

MR. TANNEN: Your Honor, are you talking about the 2016 case you cited earlier, the last pronouncement --

THE COURT: Yeah.

MR. TANNEN: -- by the Second Circuit?

THE COURT: Yes.

MR. TANNEN: The Second Circuit, at the end of its opinion, specifically preserved any discussion at all about situations where someone was injured post-confirmation from a prepetition product. And I personally believe that these extended warranty cases and ignition switch cases are (indiscernible) because they're grounded in service warranties where it's reasonable to expect that everyone is going to get their car fixed. I don't think Sears is going to admit that they -- that they knew of this hazard.

And I have a-- this is something that the Second Circuit, the Southern District of New York, and courts throughout the country have been grappling with, and she didn't know she had a claim, and they chose not to advise her about it. And I just uncovered a nationwide class action lawsuit involving their business partner, Electrolux, that formed a class of people --

THE COURT: I understand, but that's a different argument. That's a due process argument, and I understand that argument. I mean, car -- I'm sorry -- Motors Liquidation also held that if a Debtor knows of a claim that could be asserted by a particular creditor, a particular party, they need actual notice, not publication notice.

And they -- the circuit in part relying on other applicable law and the facts as developed to that point reasoned that Judge Gerber's determination that, in fact, GM

did have the ability to identify individual buyers meant that -- which they upheld not an abuse of discretion -- but that meant that there wasn't due process notice of the sale, of the free and clear sale.

But that's different than saying that a claim like this that someone didn't experience until after the sale would not be subject to the free and clear nature. They're two different points.

And I do want to address your due process point at some length, but I just don't -- I think the -- I appreciate the law may be different in other circuits, but I think that in the Second Circuit it's pretty clear that if you buy a product before a bankruptcy sale, you will have a -- and your product causes an injury after the sale, and the sale order is drafted to be free and clear of successor liability that you have the type of claim that would, in fact, not survive that order.

And there may -- you know, under particular facts, there may be some sort of claim against the buyer because it assumes some sort of legality under warranties, or it had some -- its own duty to warn, something like that, under applicable law. But it doesn't appear to me that the law in the second circuit is such that a person like Ms. Arney, whose product was purchased presale and had a defect that caused either economic or actual physical injury can get out

from under a free and clear order just because of that fact pattern, i.e. they didn't have the injury until after the sale.

MR. TANNEN: Your Honor, I hear what you're saying, but I must disagree with it. And before I go further, this is based on the assumption that Ms. Arney purchased the dryer, which is the -- apparently the entire basis for this prepetition relationship.

THE COURT: Right.

MR. TANNEN: I have been conducting my own investigation, and it could well be -- and I think it's true -- that the dryer was purchased for her family, and she's an intended user. I'm getting -- we don't allege in the complaint that she purchased it, but what I'm saying is if she purchased it, her claim would be barred. If she's an intended user, her claim wouldn't be barred.

I just think that the second circuit and all these cases that we've cited throughout our brief talk about the actual and metaphysical problems of what a claim is when someone has not even yet been injured. What Sears is saying is her claim was over the second she purchased the -- if she purchased the dryer, and I don't the cases hold for that. I think the Chateaugay -- I can't pronounce it.

THE COURT: Chateaugay.

MR. TANNEN: Chateaugay and In re Grumman, the

cases we cite talk about this netherworld where someone is injured by a product that's manufactured and sold prepetition, and the injury manifests itself, and they're injured post-sale confirmation.

THE COURT: But the --

MR. TANNEN: And I think the case is --

THE COURT: But the principle that the circuit adopts -- and it was adopted also before then, you know, In re Old Carco, which was by the same judge -- Judge Bernstein -- that authored the bankruptcy court Grumman ruling -- is that there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable, and a purchase relationship is such a relationship.

That's what they hold in Motors Liquidation three paragraphs below there. The economic -- where they say the economic loss claims arising from the ignition switch defect or other defects present a closer call than those who had accidents before the sale. But then they say like the claims of pre-closing accident plaintiffs, these claims flow from the operation of Old GM's automaker business. These individuals also, by virtue of owning Old GM cars, had come into contact with the debtor prior to the bankruptcy petition.

And they say that the -- those claims would be

covered by the free and clear sale because they had that relationship. And similar in Old Carco -- In re Old Carco, Judge Bernstein says anyone who owns a car contemplates that it will need to be repaired. That was a repair claim as opposed to, you know, an exploding dryer claim. I understand that different.

But the key was that there was that relationship, and the folks in the GM switch litigation who represented the economic loss claimants made the same argument that you made, which is that, well, yes, but in Old Carco, Old Carco had already issued recall notices for certain Durango and other Old Carco vehicles, and Judge Bernstein does say that in Carco, but then in both the bankruptcy court and district court onions in the GM switch litigation, Judge Gerber at the bankruptcy level and the district judge at the district level said Carco was right, and that the fact that there had been recall notices was irrelevant.

The relevant point was the relationship, the buyer-seller relationship. And in fact, as the district court pointed out, the people that were complaining before it didn't get that recall notice because it was for a different car. The real key was just the prepetition relationship -- the presale relationship, and that's In re GM Liquidations switch litigation 257 F.Supp.3d 372-402 (S.D.N.Y. 2017).

And Judge Gerber's discussion of Old Carco where he distinguishes Old Carco on the due process point is at In re Motors Liquidation Co., 529 B.R. 510-559360 (Bankr. S.D.N.Y. 2015)

I mean, I think you're right. The courts have grappled with this, and it does get pretty metaphysical, but Chateaugay's reference was to a bridge. No one knows -- just because you're going to cross a bridge sometime in the future doesn't give you a relationship with the people that built the bridge.

You know, it's a matter of pure chance. I think they probably had in mind when they came up with that hypothetical the bridge over -- the bridge over Saint Luis Rey by Thornton Wilder, which is all about the effects of chance on people. You know, they just happened to cross the bridge, these six people. Very little in common with anything to do with the bridge. It just collapsed when they happened to be on it. You couldn't expect them to have a claim because, you know, they didn't have a relationship.

At some level, it seems unfair. At a pretty basic level, it seems unfair. But if you have a product, you know, I guess where the Second Circuit is coming out, subject to due process issues which we have to discuss still, is that, look, if there's publication notice, that's enough. And they're not alone. I mean, the Chemetron case

from the Third Circuit held this a long time ago, 72 F.3d 341 (3d Cir. 1995) as far as due process notice where you don't know the potential claimant.

So I think for this circuit, that argument, unless there are distinguishing factors, like did Transform somehow assume the warranty liability, or did Transform under some non-bankruptcy law duty of care as the purchase have some duty to warn, something like that. Or was Ms. Arney someone who should've gotten actual notice because of Sears's knowledge of a problem with the dryer?

But none of that is really in the facts except for the inference you're asking me to draw in the supplemental pleading that you filed.

MR. TANNEN: Well, Your Honor, I -- in my brief, initially I called Diane Arney a future tort claimant who was unidentified and unidentifiable. Either --

THE COURT: Well, that's not a good fact for you though. If she was identifiable, then she should've gotten actual notice, but --

MR. TANNEN: Well, that's why this discovery of these class action -- this nationwide class action lawsuit, which was prepetition, pre-sales order formed a class of folks which included Ms. Arney --

THE COURT: Right.

MR. TANNEN: -- which required notice to be sent

by actual notice -- as best as I can tell based on my invitation, actual notice was to be sent by -- to people whose addresses were known to Electrolux. The reason why we cited that Member Select case is that Sears controlled all of the information as it relates to its own customers and its own warranties.

And so I keep on returning to the fact that what at bottom here Sears is seeking, new Sears, is an injunction. And it's based on the fact that she was either completely unknown to old Sears, which I think may not be true, or she was known and she wasn't listed or identified.

She's -- she -- the practical effect of what's going on here is her claim was extinguished even before she was injured or knew she had an injury by virtue of the fact that she bought a dryer. And I think the ignition switch cases and the Carco cases in the -- in the first instance are grounded in reasonable foreseeability, warranty, and contract law that these people bought warranties. They expected their cars to be fixed. She didn't expect her dryer to explode. Her claim is being vaporized before she was even injured. That's very troubling to get an injunction to prevent her from even trying to establish successor liability.

THE COURT: Well, let's focus on the due process point. It was raised in the supplement, the notice part,

that she should've gotten actual notice.

The record in that supplement isn't -- it doesn't leap out at you that Sears knew or should have known of her potential -- the potential that she would be injured by this product. On the other hand, I don't know what opportunities you had to take discovery or to learn the facts as to what Sears knew or should have known.

MR. TANNEN: May I address that, Your Honor? Yes. That -- if you're talking about the class action lawsuit that we cited, this is -- this is kind of my whole point is that when Sears declares that Sears the Debtor had no reason to believe that Ms. Arney was a future tort claimant, everyone's accepting that as gospel and then extinguishing her rights.

And one of the conversations I had with Mr. Barefoot before I filed my reposes is, you know, a lot of times these matters are thrashed out through adversary complaints, and there's something very summary -- not E-R-Y but a summary determination through a motion to enforce.

What if it turns out -- what if it turns out that in this class action property damage lawsuit, Kenmore and Sears got actual notice of dryer fires? What if they find -- what if we find out that Sears actually knew of this nationwide class action lawsuit involving its iconic Kenmore brand, which pursuant to contract they protected zealously?

I think the record's undeveloped, Your Honor. And to proceed to enjoin her, I think it's a harsh remedy.

THE COURT: Well, there's already an injunction. I mean, there's a -- the sale order itself is an injunction, so it's really -- and this is a point that Motors Liquidation makes. I am just -- I am being asked to enforce an existing order that has an injunction in it. So it's not an injunction of an injunction. It's not a new injunction.

But going -- I want to go with your hypothetical. The motion was filed July 13th, and we're here on September 27th. That's not the length of time that a plaintiff in a lawsuit in, you know, X v. Y type litigation generally has to deal with developing facts. On the other hand, there is this existing order, and it would seem to me that the proper vehicle for you to deal with that hypothetical, if it ever becomes true, would be a motion to vacate an order enforcing sale --

MR. TANNEN: A motion to vacate which order?

THE COURT: An order enforcing the sale order, an order granting this motion. In other words, if I determined that what you've offered up to date is not enough to show that Ms. Arney should've gotten actual notice, and she should've instead have just gotten publication notice, which I've found was adequate, if you learn later of facts, then you're always free within the time prescribed by Rule 60 to

move to vacate an order.

There's a standard for that. You know, should you have known or could you have known of those facts before today? But if it's newly discovered evidence that couldn't have been discovered reasonably before this hearing, then what you've just outlined would be a clear basis to vacate the order because you've learned new facts, which is --

I mean, it's been asserted to me by Transform that there was no knowledge of this problem with the dryer, and therefore they didn't need to give -- Sears didn't need to give actual notice. What you've asserted really, I think, requires me to make an inferential leap that I'm not sure I'm ready to make here, unless you can point out to me something -- and I want to give you the chance to do that during this argument -- which is Kenmore is the manufacturer. How does Sears know of the problem if it's not the manufacture? It's not GM, for example, that tested the ignition switch. You know, if it did or it's not Dodge that trust the fuel line or was aware of the fuel line problems in the cars at Old Carco.

So I think that's a step that's hard for me to take. But I can infer that it knew that because Kenmore settling a lawsuit against it --

MR. TANNEN: Your Honor, what happened was it was a class action lawsuit against Electrolux, the manufacturer

--

THE COURT: I'm sorry. Electrolux. Excuse me. Electrolux.

MR. TANNEN: And so the reason why I attach the Member Select case was there are contracts which vested remarkable ability and gave contractual rights to Sears to approve everything, to dictate everything, and to know everything.

THE COURT: Well, can you point out to me where they -- those rights would've given Sears the ability to know of manufacturing defects that were identified in the lawsuit that was settled?

MR. TANNEN: There were -- within the sales, within the contracts between Electrolux and Sears, Electrolux had reporting requirements. Sears could come in and check out the manufacturing process.

THE COURT: Well, where is that --

MR. TANNEN: They had --

THE COURT: Where is that? I want to make sure I have that in the record.

MR. TANNEN: Well, hold on, Your Honor.

THE COURT: Okay.

MR. TANNEN: So judge -- the judge in the federal court case involving a situation where Sears had withheld the agreements between it and Electrolux, we (indiscernible)

cited it in our brief that the universe -- uniform terms and conditions gave Sears the right to receive from Electrolux information about the methods of manufacturing products, the right to inspect its production facility, the merchandise being manufactured.

The supply agreement gave Sears the right to require Electrolux manufacture products for Sears according to specifications set forth in the agreement, to approve any changes to products, to require that testing be done. And then Electrolux awes actually supposed to train Sears personnel about how to answer questions and service dryers. And so in this class action that settled in 2015, Electrolux was supposed to train Sears personnel about how to better clean the dryers to prevent that accumulation of lint.

MR. BAREFOOT: Your Honor, could I respond to this point?

MR. TANNEN: Excuse me, Mr. Barefoot, I'm still speaking.

THE COURT: I'm sorry. I know that you refer to a potential joint venture --

MR. TANNEN: Yes.

THE COURT: -- between Electrolux and Sears.

MR. TANNEN: Yes.

THE COURT: But where is the rest of this coming from? What document is it in that you've submitted to me?

MR. TANNEN: Well, Your Honor, I'm going to say somewhat defensively we just found out about this class action lawsuit, and I've been speeding along to try and provide the Court with --

THE COURT: No, I --

MR. TANNEN: -- information.

THE COURT: That's fine. I'm just trying to figure out where this -- what you're reading from, where is it? Is it in something you've given me already?

MR. TANNEN: Yes, yes. I'm sorry, Your Honor. We attached the -- we attached the uniform terms and conditions and the supply agreement to Exhibit 3 to our status report. It's in seven-point font. It's hard to read, but the clear impact of the relationship between Sears and Electrolux is Sears says "jump," and Electrolux says, "how high?"

There was a call center maintained by Electrolux for Sears customers. Sears held on to all the warranty claims and purchase information of Electrolux dryers. What we've learned in discovery so far, Your Honor, is Electrolux does not -- the name Electrolux does not appear in any of the consumer product literature, the safety manual, the use and care manual. Electrolux was behind the scenes.

This is Kenmore's iconic brand. Sears protected it, and I think it's extremely premature, in my view in light of these facts and inferences, to say that -- to

accept that Sears had no reason to know, and to foist upon us the duty of Rule 60, I don't know, Your Honor. It seems very harsh based on this.

And one more thing, Your Honor. What if it does turn out, as it might, that if Diana Arney is a record owner of the home, but what if her -- which I think is going to show her daughter ordered the dryer online on Black Friday, and it was brought to her house, so she's an intended user.

THE COURT: Again, that's a -- look. We only decide things that are before us. Those facts will raise literally at 12 noon today. They're not even asserted before in either of the pleadings that are filed.

MR. TANNEN: I under -- I recognize that, Your Honor. I recognize that, Honor, but there is a tremendous amount at stake for Ms. Arney.

THE COURT: Well, I understand that.

MR. TANNEN: And Your Honor, it's been two months since the motion was filed. I've been all over this case trying to learn information. You've seen the letters that I've tried to get information from Sears. And all of this is premised on Sears ipse dixit declaration that they had no reason to know of Diane Arney's identity, existence, or type of claim.

I think that I've clearly shown that that might not be true. I've distinguished the caselaw that tort

claims like this as opposed to asbestos claims or mass tort claims, or warranty claims, that this is different. This is carved out in the Second Circuit case in 2016. It wasn't answered by Grumman because it was not ripe. I think it's right in -- this is the fact pattern that the Second Circuit and the Southern District of New York has been grappling with.

THE COURT: Okay.

MR. BAREFOOT: Your Honor, could I respond to this due process point relative to the supplement, please?

THE COURT: Sure, but I think, Mr. Tannen, you were pretty much finished except in responding to whatever Mr. Barefoot has to say.

MR. TANNEN: Well, except, Your Honor, that this supply agreement has numerous exhibits. There are documents out there I haven't seen yet, and a federal court has already ruled about Sears' very strong authority and ability to dictate the entire relationship between it and Electrolux.

Her claim is being extinguished before she was even injured, before she even knew she was injured, and without any notice whatsoever, particularly when there was a class action lawsuit, Your Honor, which required actual -- which required Kenmore, which is Sears, to send out post-manufacture warnings about these dryer fires.

This -- I don't know, Judge. This is -- I've read every single case --

THE COURT: So you haven't --

MR. TANNEN: I just -

THE COURT: You haven't looked into yet how Kenmore went about giving those notices, right?

MR. TANNEN: I am looking into it, Your Honor. I want to tell you that the case -- we've discovered the case. I was talking to class counsel as late as Friday, and there was a claims administrator, and notice was -- she said in her report to the Court that 660,000 notices would be sent out after 2015 specifically notifying class claimants of the class action settlement. A questionnaire was to be given about whether they had had a dryer fire.

These amplified notices were supposed to be sent out. I don't know as I sit here today whether Kenmore customers were given actual notice. One of my sayings, Your Honor -- and I have many -- is that even hypochondriacs get sick, and I think it's possible that Kenmore -- Sears and Kenmore knew about this litigation, and they fought to not have actual notice sent to Ms. Arney, so she had no notice of the class action lawsuit, no notice of the bankruptcy, no notice of the motion to approve the plan, and her rights were extinguished before she had an injury.

Now, based on your prior comments, I think you're

about to tell me that all those things are the perfect recipe for you to conduct a bunch of discovery and come back to you, you know, a year from now. But I have not seen that remedy set forth in any of the cases that I've read, and I think it's very problematic to accept Sears' declaration that they had no knowledge. She didn't have a right to payment when her -- when the bankruptcy was filed.

THE COURT: Well, in Motors Liquidation, there was a whole report on what GM knew, and when, and the like. So there was a well-developed factual record.

MR. TANNEN: And I think, Your Honor -- and correct me if I'm wrong. I'm not sure if that arose in the motion to enforce context or in adversarial context.

THE COURT: No, in the --

MR. TANNEN: I don't --

THE COURT: I think they were going back and forth the whole time.

MR. TANNEN: But what did Sears know, and when did they know it I think is important to resolving this issue. And I've been on this case for two months, and the sale was accomplished in five months. And new Sears cited zero cases in their motion to enforce. They're threatening my client with sanctions. They're saying we're being disingenuous, and they may be sitting on reams, and reams, and reams of information. And she -- I don't know if we've gotten to the

due process argument. She hasn't gotten any.

THE COURT: Okay. So Mr. Barefoot?

MR. BAREFOOT: Just very briefly, Your Honor. I think with respect to the cases that are cited in the supplement, the Roberts case that was the class action Mr. Tannen referred to, Sears was not a party to that case, so I think it's a mischaracterization to say that Kenmore or Sears were required by the settlement decree there to send out notices. Sears was not a party, and that's not what the settlement order says.

As to the second case, it was a discovery issue. There was no finding in that case as to whether the plaintiffs would ultimately prevail, and certainly no finding as to whether the provisions of the supply agreement that Mr. Tannen has referred to were actually used or implement.

And those processes -- you know, he pointed out a number of remedies and rights in that supply agreement that Electrolux -- or Sears had as to Electrolux. There's no indication -- first off, none of those refer to notices that Electrolux would be required to deliver to Sears or vice versa concerning a product's liability. And there's certainly no finding that any of those potential channels of communication were ever used. And I think that's a very important distinction between the ignition switch case and

the very slim read of one product's liability case having been filed against the Debtors prepetition with no findings of liability.

In the ignition switch case, GM admitted that they had knowledge. There was an extensive documentary record of that, and they issued recall notices. They admitted that there was a product defect. It's quite a different situation when you have a single plaintiff.

THE COURT: Well, why shouldn't I give Mr. Tannen a limited opportunity to take discovery as to what notice Sears had of the lint issue or lint problem with Electrolux dryers. And included within that would be whether, as part of the notice program -- so you can have it pinpointed to that period -- Sears was aware of the what would appear to be pretty extensive notice to potentially a lot of their customers since, I think I can reasonably infer that Electrolux dryers were sold a lot by Sears, and including whether, you know, their customer records were used as part of that notice program.

I mean, to me, that's not the type of discovery that you're concerned about in the Illinois state court litigation, which is discovery going to the merits of whether there's a successor liability claim. This is discovery as to whether there was a due process notice to Ms. Arney. So that would be discovery in the auspices -- or

under the auspices of this motion, this -- you know, this dispute.

I appreciate -- I think your answer's probably going to be, "Well, they could've done that over the last couple of months," but I -- frankly, if I granted your motion, I have the feeling that Mr. Tannen will be able to arguably get some other facts anyway and come back to me seeking a motion to vacate. So my inclination is probably to give him, you know, a couple of months to have that targeted discovery.

MR. BAREFOOT: Your Honor, if that's your ruling, we'll of course respect that. I'm not sure that we need a couple of months for what I think you're characterizing would be --

THE COURT: Well, I think it would be -- I would say normally if it was just discovery between new Sears and Ms. Arney, I might agree with you, but I think there's going to be third parties involved here. You know, Electrolux, Kenmore, maybe someone who --

MR. BAREFOOT: Your Honor --

THE COURT: -- can be identified as a relationship person who's no longer at new Sears. So I think it probably will take longer than you want.

MR. TANNEN: Your Honor, I will work with all deliberate speed to get to the bottom of this through what I

will call fracking of court records all over the country. But --

THE COURT: First I thought you were just pausing in thought, but I think you're frozen on the screen.

MS. MARCUS: Your Honor, maybe this is a good time for me to intercede. Jacqueline Marcus, Weil Gotshal & Manges on behalf of the Debtors.

I've been quiet all morning, Your Honor, because this issue largely doesn't involve the Debtors, as Mr. Tannen had indicated earlier. He stated on numerous occasions that Ms. Arney is not pursuing the Debtors. But when we start talking about discovery, I get a little bit concerned (indiscernible) conversation regarding professional fees because as Your Honor may be aware, substantially all of our books and records were transferred to Transform in connection with the sale.

THE COURT: Right.

MS. MARCUS: And therefore, we don't have any records. And I'd like to, as best we can, insulate the Debtors from trying to effectively duplicate. If Mr. Tannen seems to seek discovery from Transform, I assume that will largely encompass the records that were turned over from Sears to Transform, and therefore the Debtors don't have to participate in that effort.

THE COURT: Right. Well, look. Both you and Mr.

Barefoot have been involved in litigations in this case with me. I know that the two of you will work constructively to avoid duplication.

Mr. Tannen has not appeared before me before, but he looks like he really knows what he's doing too, so I expect all three of you to coordinate the discovery to minimize, you know, duplication of effort, to have the meet-and-confers in advance so that you can sort of focus on how to target this.

Again, the data mining of, you know, for potential lawsuits doesn't involve either new Sears or old Sears. It does seem to me that targeted discovery could be clearly had as far as the notice program that we've been discussing in connection with the lawsuit, how that was done, and of course at around that time would be the logical time that Sears would've been informed of this type of problem, if they were informed. So I think it can be pretty targeted.

MR. TANNEN: Your Honor, I just had my internet go in and out, and I didn't hear what Ms. Marcus said. I apologize.

THE COURT: All she --

MR. TANNEN: I didn't hear --

THE COURT: That's fine. All she was saying is she would hope that since the Debtor Sears, old Sears, really doesn't have any former employees who would be

involved in this or books and records that would relate to it since those were transferred to new Sears that you would coordinate so that the discovery burden would be minimal on old Sears. And that's why I was responding the way I did.

MR. TANNEN: Okay. Your Honor, two more points, and I'm supremely grateful that you've allowed me to speak as much as I've been able to today.

There's two other issues. And what this began with for me initially is a search for applicable insurance proceeds that might be able to be applicable here, and I think this is relevant.

Sears claims that the policy that was triggered is a 2008 policy when the dryer was manufactured and sold. I happen to believe that under a current policy, that should've been a policy when the injury occurred. I'm being informed that new -- old Sears has no insurance going forward, that they got no tail coverage whatsoever, and this is kind of what sent me, you know, down this path. But I do think it's relevant because it's conceivable that through the sale order with no notice to my client, her rights were extinguished.

The second point I wanted to add --

THE COURT: But I think that's why they don't keep spending money for insurance, because they were relying on the sale. But anyway.

MR. TANNEN: I got that. And then the second point, Your Honor, which if it's true, we will establish it via affidavit, but if Ms. Arney was not the actual purchaser of this dryer, that in fact it was her daughter, that undercuts the prepetition relationship argument --

THE COURT: I don't know.

MR. TANNEN: -- potentially.

THE COURT: Potentially it does. But that -- you're right. That is a potential fact issue. On the other hand, it's a little different than someone who buys a used car and later claims loss of economic value. I mean, if they're -- so it's a fact issue. But that's something that you and Transform may want to have discovery on too, clearly.

MR. TANNEN: Okay.

THE COURT: Yeah.

MR. TANNEN: Thank you, Your Honor, for all the time.

THE COURT: All right. So I have a motion by Transform SR Brands LLC, which is the Defendant, in a lawsuit pending in state court in Illinois asserting successor liability on behalf of Diana Arney, A-R-N-E-Y. The underlying facts of the lawsuit are that Ms. Arney had a clothes dryer purchased from Sears that is alleged to be the cause of a fire that caused substantial property damage and

personal injury.

The washer-dryer was manufactured by a company called Electrolux. The fire occurred after the date of the sale of substantially all of the Sears Debtor's assets to Transform Holdco, which I approved by an order dated February 8, 2019. That order contains findings in Paragraph M that the buyer that would have no successor or other derivative liability, and in Paragraph P that there was due insufficient notice of the proposed sale, which was a free and clear sale under Section 363(f) of the bankruptcy code.

The order then went on to provide in Paragraph 4 that such notice was adequate, appropriate, fair, and equitable under the circumstances, provided in Paragraph 19 that the sale would be free and clear under Section 363(f) of the bankruptcy code of essentially all liens, claims, and interests, claims being very broadly defined in coterminous with the definition of claim in Section 101(5) of the bankruptcy code.

And then specifically also provided in Paragraph 27 that the buyer and the buyer-related parties and their affiliates and successors (indiscernible) shall not be deemed or considered to be a legal successor, a de facto, or otherwise merged, be the alter ego of, etc. In essence, a determination that there would be no successor liability.

The motion therefore seeks a determination that

the Illinois lawsuit by Ms. Arney is barred by the sale order. And it does appear to me that, at least for purposes of this ruling, the root cause of the injuries as alleged in the complaint, the dryer, was indeed purchased before the sale to Transform, and that because of that, at least before me today, purchase relationship between the Plaintiff, Ms. Arney, and the Debtor, Sears, a claim arising from the dryer would be barred by the sale order.

The Second Circuit has grappled with fact patterns like this for many years now in a bankruptcy context but lent a great degree of clarity to the issues in In re Motors Liquidation Company, 829 F.3d 135 (2d Cir. 2016).

There, the Court dealt with a similar fact pattern, a motion by a purchaser in a Section 363(f) free and clear sale, in that case referred to as new GM, to prevent further litigation by various plaintiffs who alleged -- among other things but this is -- these are the allegations that are relevant as far as that opinion in this matter before me -- that while they purchased their car from old GM before the 363(f) sale, they became aware of the defect in the product, namely a faulty ignition switch that would at times cause cars, including running at full speed, to stall or turn off. And therefore, it caused serious physical injuries as well as economic damage.

The Court dealt with certain arguments that are

raised in Ms. Arney's objection to Transform's motion in that context. First, it concluded that the Court, that is the bankruptcy court and therefore the federal courts through the appeal process -- had subject matter jurisdiction under 28 U.S.C. Section 1334(b) in that the dispute arose in the bankruptcy case, which the Court determined at least included disputes that would have no existence outside of the bankruptcy.

And here, as in the Motors Liquidation case, the dispute involved the interpretation and enforcement of the prior sale order, and "An order consummating a debtor's sale of property would not exist but for the Code." Therefore, the Court plainly has jurisdiction to interpret and enforce its own prior orders. 829 F.3d at 153, citing, among other cases, Travelers Indemnity Co. v. Bailey, 557 U.S. 137, 151 (2009).

The next issue that the Court dealt with was the precise -- was not withstanding, rather, that Section 360(3)(f) does not precisely define an interest in property that a 360(3)(f) sale would be free and clear of, but the Court concluded, as had prior courts in the Southern District of New York, as well as circuit courts nationwide, that successor liability claims would qualify as claims under Chapter 11, through the definition of 11 U.S.C. Section 1015 and Section 363(f) extended to, or extends to,

claims. In Re Motors Liquidation, 829 F.3d 155, citing among other cases, In re Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003). That had generally been the approach of courts, as I noted, in the Southern District of New York, even before the Motors Liquidation case. See, for example, Burton v. Chrysler Group, LLC (In re Old Carco LLC), 492 B.R. 392, 402-403 (Bankr. S.D.N.Y. 2013).

The Court then grappled with the fundamental issue as to how far the definition of claim should be taken in a 363(f) context. The Second Circuit noted that claim is defined quite broadly and includes any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

It noted that it had come up to the point of recognizing the issue, but not deciding it in In re Chateaugay Corp., 944 F.2d 997, 1005 (2nd Cir. 1991), but then in a later opinion in the same case had recognized that claim could not be infinite and have to have some limits to it to avoid enormous practical and perhaps constitutional problems. In re Chateaugay Corp., 53 F.3d 478, 497.

In reviewing the case law then, including those decisions, the Circuit stated as follows: "To summarize, a bankruptcy court may approve a Section 363 sale free and

clear of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment, (2) that arose before the filing of the petition or resulted from prepetition conduct fairly giving rise to the claim. Further, there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable." In re Motors Liquidation Co., 829 F.3d 156.

In applying that rule, the Court found no problem, of course, in finding that pre-closing accident claims would be not assertable on a successor liability basis against New GM, but then determined that economic loss claims arising from the ignition switch defect or other defects because they arose based on an individual's purchasing and ownership of Old G M cars would be covered by the free and clear order because the relationship was close enough. "In other words, Old GM's creation of the ignition switch defect fairly gave rise to these claims, even if the claimants did not yet know." Id. at 157.

This is in keeping with the In re Old Carco LLC case that I previously cited, where Judge Bernstein found that the plaintiffs who were asserting successor liability in that case had a pre-petition relationship with the debtor, i.e., their purchase and ownership of the debtor's cars and, of course, that the design flaws there, as is

alleged here, existed pre-petition, and therefore, they had a close enough relationship to have a claim that would be subject to the free and clear order. As stated by Judge Bernstein, "Anyone who owns a car contemplates that it will need to be repaired, particularly when, as here, Old Carco had already issued at least two and possibly three recall notices for the 'fuel spit back' problem for certain Durango and other Old Carco vehicles before bought the vehicles from Old Carco." 492 B.R. 403.

The Plaintiff objector here, Ms. Arney, understandably latches onto the last clause that I quoted to distinguish the Old Carco case from the present facts. There were no recall notices, to the extent we're aware of, with regard to the dryer at issue here. However, since that decision, courts have not required that level of extra relationship beyond the seller/buyer relationship to subject a purchaser of a debtor product to a free and clear order. See, for example, In re GM Liquidation Switch Litigation, 257 F. Supp. 3d 372, 402 (S.D.N.Y. 2017). And of course, the Motors Liquidation Co. case itself found a sufficient relationship without any notice to the economic loss claimants.

Similarly, these cases are distinguishable from Morgan Olson LLC v. Frederico (In re Grumman Olson Industries) 467 B.R. 694 (S.D.N.Y. 2012). Indeed, the same

judge, Judge Bernstein, issued the underlying opinion that was affirmed by the District Court that I just cited, that appears at 445 B.R. 243. The relationship in the Grumman case was between a post-sale tort claimant and a parts manufacturer. It's reasonable to assume that there was an insufficient connection, therefore, between the plaintiff and the parts manufacturer, as opposed to the purchaser of a car that malfunctions, or in this case, a dryer.

So, I conclude that assuming there was procedurally proper due process as far as the sale notice was concerned, I would grant the motion and enforce the sale order. However, it appears to me that there is a potential issue as to procedural due process that warrants limited and focused discovery before such an order is granted.

The same case that I've been relying on, In re Motors Liquidation Co., in essence has a second holding which discusses procedural due process in this context, and notes that in a bankruptcy context, the general principle of Mullane v. Century Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) applies in the following way: "The general rule that emerges is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable, and whose legally protected interests are directly affected by the proceedings in question." 829 F.3d at 159, quoting Schroeder v. City of

New York, 371 U.S. 208, 212-13 (1962). The Circuit then goes on to say, "In other words, adequacy of notice turns on what the debtor knew about the claim, or with reasonable diligence should have known. Id.

In that case, the lower court had found that based on its obligations under applicable non-bankruptcy law as a manufacturer of the vehicle, Old GM knew or should have known of the ignition switch defects, and therefore, that due process notice was not provided to the plaintiffs, who knew GM was seeking to enjoin by enforcing the sale order. The circuit agreed with that determination and further said that those parties' rights needed to be specifically recognized as assertable by them, as opposed to by others who stood in their same position.

Here, albeit really quite recently as far as this motion is concerned, i.e., on September 24, the motion having been filed on July 13, Ms. Arney has submitted materials related to two litigations involving dryer fires, which includes also a contract between Old Sears and the dryer manufacturer or marketer, that suggests at least a reasonable basis for further discovery as to whether Old Sears knew or reasonably should have known that those who purchased these types of dryers from it were at risk of having a dryer fire, and therefore, should have given notice that clearly the parties acknowledge was not given, i.e.,

individualized notice as opposed to publication notice to Ms. Arney.

The class action settlement referred to contemplate an extensive notice process to buyers of these types of dryers that I believe is worth delving into as to how that notice was provided. I could, I believe, reasonably infer that it might have been provided to the original purchase information, which again, one could reasonably infer was within Sears' control, and that therefore, Sears may have been asked to assist in the notice process.

As the Motors Liquidation case makes clear, the facts requiring individualized or particularized notice, as opposed to publication notice, may turn on unique circumstances. So I cannot say today what would be enough of a basis to put Sears on inquiry notice as far as having to give notice to Ms. Arney. But I believe that the targeted discovery should take place so that she has a reasonable opportunity to show that she was entitled to individualized notice.

So, I'm ruling definitively, or dispositively, as to the -- to grant the motion insofar as it asserts that the order would have covered this dryer, assuming as I am for today, that Ms. Arney was the purchaser of it. But I am leaving open for further discovery and further submission by

the parties whether she obtained due process, as regards to the sale motion that led to the order that Transform seeks to enforce.

As noted during oral argument, although this is apparently different than the theory of the complaint, it turns out that Ms. Arney did not purchase the dryer, and it can be established in some way that she did not have the type of relationship with Old Sears that I've found would exist clearly if she were the purchaser. That issue is also open.

So I'll ask the parties to confer about the scope of the discovery consistent with my ruling and how long they expect it to take and ask you to submit a pre-trial order that would have a discovery cutoff date based on that discussion.

I would hope that it would take 60 days after that meet and confer, although I recognize that some of the discovery may be taken from third parties, which may delay or lead to a reasonable basis to extend that 60 day period, in which case, if it turns out that notwithstanding good faith efforts by Ms. Arney's counsel to be diligent in taking that discovery, it's being delayed, in all likelihood, I would enter an amended pre-trial order to reflect that.

You should also get a hearing date from Ms. Lee,

my Courtroom Deputy, for a renewal of this hearing on the due process issues that I've outlined. And conceivably, if the facts show, or at least one side says the facts show, that Ms. Arney wasn't the purchaser and had enough of a remote relationship so that my ruling wouldn't apply to her, we'll have that hearing then.

If it's to be an evidentiary hearing, i.e., if there's a dispute about those issues, you should have the provisions that are in my standard pre-trial order about the conduct of that evidentiary hearing. But we would have a pre-trial conference before the hearing, if it's to be an evidentiary hearing. It may not be. You may agree on the factual record.

But if it is, my practice, Mr. Tannen, for evidentiary hearings, particularly where you're appearing by Zoom, requires the parties to submit direct testimony by declaration or affidavit, with the witness to be available for cross and redirect, and for the parties to meet and confer and agree on the admissibility of as many exhibits as they can in good faith, and to have a joint exhibit binder for the witnesses and the Court, with any exhibits for cross or impeachment to be provided to the witness, assuming we're still going to do this by Zoom, in a closed file or closed binder that the witness opens when they're being cross-examined.

MR. TANNEN: Like the old days.

THE COURT: Yeah. So, I'll look for that order. Frankly, I think all three of you would be delighted if there actually were insurance that would pay for this, but I don't see any reason that any of you should be hiding the ball on that. So hopefully, that isn't happening, and that if there is insurance, it'll be identified, and perhaps this can be resolved that way. But if not, we'll proceed along the lines that I've just outlined.

MR. TANNEN: Your Honor, two questions. And it may seem like I'm seeking an advisory in from you, but you stated that you're making a dispositive ruling on the issue of whether the type of claim that Ms. Arney had may or may not have been encompassed by the sales order and we're moving to the due process claim. I don't want to be forced to file some sort of notice of appeal from that until everything is all done.

THE COURT: No, that would be an interlocutory ruling. You should wait --

MR. TANNER: That's what I thought.

THE COURT: You can wait until I rule on the entire motion.

MR. TANNER: And then secondly, Your Honor, I have had many, many conversations with Ms. Marcus, and I must say I recognize the pressures that they're under, based on the

fact that they're no longer doing business. There is baseline insurance information, which I'm hearing you say we should encourage to try to get, but you're not directly ordering insurance information at this point.

THE COURT: Well, I mean, I think if the Debtor has insurance, they'll provide it, because that's what insurance is for. They're not trying to save it for someone else. Right, Ms. Marcus?

MS. MARCUS: And we have responded, Your Honor, and answered all of Mr. Tannen's questions. To the extent he wants policies that we haven't been able to locate yet, we're trying to do that. But we've been very forthcoming with the insurance information.

THE COURT: Yeah. I mean, I really -- in this case, I mean, I've issued a lot of lift stay orders, for example, where parties have gone to the insurance. And the Debtors, they're not -- they have no reason to hoard insurance here. You know, it's not that type of case. There's not like a -- it's not a mass tort case where the insurance is going to need to be parceled out on anything other than a first-come first-served basis.

So I think -- I don't think you should be skeptical, but they're going to come up with whatever they can. If you become aware of something that they're not aware of, let them know it and, you know, they'll look for

it.

MR. TANNEN: Your Honor, thank you very much again for allowing me to appear.

THE COURT: Okay. Very well. And again, this is discovery that's going to take place here. And I really can't issue a final order on this motion until that's done. So I think you should probably let the judge in Illinois know that as far as Transform is concerned, there's going to be further delay because of that. Although I'll try to move it along as fast as I can.

MR. TANNER: We will so advise the Court and will, of course, copy Mr. Barefoot or their Illinois counsel on whatever we communicate with the Court.

THE COURT: Okay. Thanks, everyone. I think that concludes --

ALL: Thank you, Your Honor.

THE COURT: -- today's Sears calendar. Thank you.

(Whereupon these proceedings were concluded at 12:57 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: September 29, 2021